Arbitration and Mediation

STRATEGIC CONSIDERATIONS

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Arbitration

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Contractual Arbitration

- Alternative to court resolution
  - Public record / confidentiality
- Plaintiffs will resist.
  - Better chance of recovery with a sympathetic jury
- No right of appeal with arbitration
- Costs

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Maximizing Success

- Written Agreement
- Clear consent to arbitration
- Language which states that the parties have agreed to have their dispute submitted to arbitration and that the arbitrator's award shall be binding
- Language which states that the parties agree to have judgment be entered upon the award
- Specify where the award will be enforced
- State how the arbitrator will be selected
- Agreement must not be one sided or lopsided

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Arbitration Agreements without Signatures

- Always better, whenever possible, to have signed agreements to arbitrate.
- However, many instances where agreements remain unsigned:
  - "Envelope stuffers"
- "Chain of custody" issues
- Various periods of unenforceability / favorability; but currently largely enforceable

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Armendariz v. Foundation Health, 24 Cal. 4th 83 (2000)

- Seminal California case on arbitration agreements in employment context
- Court held that discrimination claims asserted pursuant to California's Fair Employment and Housing Act ("FEHA") may be subject to binding arbitration
- Must have consideration in exchange for the employee agreeing to arbitration
- Neutral arbitrator
- Allow for more than minimal discovery
- Require a written decision by the arbitrator
- Allow for types of relief otherwise available in court
- Not require employees to pay unreasonable costs or any arbitrator fees or expenses

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Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407 (Apr. 24, 2019)

- United States Supreme Court (following USDC Central CA and 9th Circuit)
- 5-4 Decision
- Courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement
  - Issues re: lower costs, speedier resolutions and rights of absent class members
- Courts are prohibited from inferring from an ambiguous agreement that parties have consented to arbitrate on a class wide basis

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Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA")

- Amends Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or sexual harassment to invalidate a pre-dispute arbitration agreement or collective action waiver.
  - "Sexual assault" is defined as a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 (the U.S. criminal code) or similar applicable tribal or state law, including when the victim lacks capacity to consent.
  - "Sexual harassment" is defined as "conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law"—meaning that it covers anything that would qualify as sexual harassment under Title VII or FEHA.
- Applies to disputes or claims arising or accruing on or after March 3, 2022.
- Requires courts, rather than arbitrators, to determine whether the Act applies to a claim regardless of whether the underlying agreement delegates the authority to an arbitrator
- Signed into law by President Biden on March 3, 2022.

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The EFAA: Issues to Consider

- Does not apply retroactively – it only applies to "any dispute or claim that *arises* or *accrues* on or after the date of enactment."
  - **BUT**: it may still invalidate pre-dispute agreements entered into prior to its enactment.
- Only applies to a claim that "relates to" sexual assault and sexual harassment.
  - **BUT**: what about other claims alleged in the same complaint?
    - What if there are discrimination, retaliation, and wrongful termination claims based on unrelated protected classifications?
    - What if there are employment claims which are not related at all to the sexual harassment allegations?
- What changes are required in arbitration agreements going forward?

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Prohibitions on Arbitration [AB 51]

- Assembly Bill 51 went into effect in California on **January 1, 2020**, effectively prohibiting "forced arbitration" as a condition of employment**.**
- Reversed case law that allows employers to unilaterally impose pre-dispute arbitration agreements on employees as a condition of hire or continued employment.
- Prohibited employers:
  - From requiring applicants or employees as a condition of employment, continued employment, or the receipt of any employment-related benefit to waive "any right, forum or procedure" for a violation of any provision under the Fair Employment and Housing Act or the California Labor Code, including the right to file and pursue a civil action or complaint with any state agency, court or other governmental entity.
  - From threatening, retaliating or discriminating against employees who refuse to enter into such mandatory arbitration agreements.
  - Prohibited arbitration agreements that are not entered into voluntarily – no coercion.

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Is AB 51 preempted by the FAA?

- **The Federal Arbitration Act:** a written, pre-dispute arbitration agreement in transactions involving commerce (including employment), which require arbitration of controversies between the parties, is valid, irrevocable and enforceable and must be enforced according to its terms.
- A state may not pass or enforce laws that interfere with, limit, or discriminate against arbitration. To the extent states do pass such laws, the laws are superseded and preempted by the FAA.

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Ninth Circuit: AB 51 Is Preempted by the FAA

- *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (Ninth Cir. Feb. 15, 2023).
  - FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement.
  - AB 51 created a burden to the formation of an arbitration agreement.
  - The 9th Circuit enjoined enforcement of the law in its entirety, but keep in mind legal landscape in this area changes quickly.
  - No preemption with the EFAA because the EFAA is federal, not state, was is an actual amendment to the FAA.

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Mediation

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Mediation: A non-binding resolution

- Private Mediation
  - Costs Money
- Court Provided Options
  - No cost or reduced fee
- Examples for Various Courts
  - Los Angeles Superior Court: Mandatory Settlement Conference
  - San Diego Superior Court: Reduced cost mediators from panel
  - Orange County Superior Court: Reduced cost mediators from panel or Early Neutral Evaluation
  - United States District Court for the Central District of California: (1) Settlement Conference with judge; (2) mediation with neutral selected from panel (first 3 hours free); or (3) private mediation
  - United States District Court for the Southern District of California: Early Evaluation Conference

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Mediation and Confidentiality

- Evid. Code § 1119: Confidential
  - Statements made and writings prepared in connection with mediation
  - Evidence
  - Mediation statements and briefs
  - Negotiations
    - Demands, offers and counteroffers
  - Communications
- Evid. Code § 1120: Mediation does not render admissible evidence non-admissible
- Evid. Code § 1121: No report, opinion, recommendation, or finding can be submitted to Court by mediator
- Evid. Code § 1127: Mediator cannot testify, and if subpoenaed and asked to testify can seek attorney's fees and costs against party seeking testimony

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Mediation: Disclosure of Confidentiality Cal. Evid. Code § 1129

- Effective January 1, 2019
- Attorney must provide the client with confidentiality disclosure regarding mediation and obtain client's signed acknowledgement.
- *Cassel v. Sup. Ct.*, 51 Cal. 4th 113 (2011)
- **Mediation Disclosure Notification and Acknowledgment**
  - To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

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Mediation: Disclosure of Confidentiality Cal. Evid. Code § 1129

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.
- This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

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Mediation: Disclosure of Confidentiality Cal. Evid. Code § 1129

- I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

- NOTE: This disclosure and signed acknowledgment does not limit your attorney's potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

- Include signature blocks for [Name of Client], [Name of Attorney] and date signed.

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Mediation Strategies

- When to hold/schedule mediation?
- How to begin?
  - Joint room - introductory argument of case with all parties
  - Separate rooms for all parties - no introductory argument
- Bracketing
- Mediator proposals

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Enforcing Agreements Reached at Mediation

- Draft release v. memorandum of understanding
- Signed by opposing party
- Language that it is enforceable or binding or words to that effect
- Contains all essential terms
  - Confidentiality Provision
  - Cal. Civ. Code § 1542 Waiver
  - Confession of Judgment
  - Acceleration Clause
  - Retention of Jurisdiction

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Questions?

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Thank You

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